JD(ATL)–45–05
Pocahontas, IA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

ARMSTRONG MACHINE COMPANY, INC.

and **CASES 18–CA–16276–1 (E)**
18–CA–16555–1 (E)

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 6, AFL–CIO, CLC

David M. Biggar, Esq., for the General Counsel
Peter J. Ford, Esq., of Washington, D.C.,
for the Charging Party
Becky S. Knutson, Esq. and William D. Thomas, Esq.
(Davis, Brown, Koehn, Shors & Roberts),
for the Respondent

SUPPLEMENTAL DECISION

Keltner W. Locke, Administrative Law Judge: The Applicant seeks reimbursement for attorney fees and expenses under the Equal Access to Justice Act. Because I find that the General Counsel was substantially justified, I deny the Applicant's petition.

Procedural History

On January 3, 2002, the United Food and Commercial Workers, Local 6 (the "Union"), filed an unfair labor practice charge against the Applicant in Case 18-CA-16276-1. After an investigation, the Regional Director issued Complaint in this matter on July 9, 2002.

On August 19, 2002, the Union filed a charge against the Applicant in Case 18-CA-16555-1. On September 3, 2002, the Regional Director ordered this matter consolidated with Case 18-CA-16276-1 and amended the Complaint.

On September 17, 2002, a hearing opened before me in Fort Dodge, Iowa. After the hearing closed on September 26, 2002, the parties submitted briefs.

On March 7, 2003, I issued a decision which recommended dismissal of some but not all allegations. In the Complaint, the General Counsel had alleged that a number of statements by

Armstrong's owner and president, Clifford Porter, violated Section 8(a)(1) of the Act. My decision concluded that some of Porter's statements did interfere unlawfully with employees' Section 7 rights but that in other instances, the General Counsel had not proven a violation. In some of these instances, I found that Porter had made the alleged statement but that it did not violate the Act. In some other instances, based on credibility determinations, I found that Porter did not say the things which the discredited witness had attributed to him.

My decision also recommended that the Board find that Armstrong had violated Section 8(a)(3) and (1) of the Act by discharging two of the four alleged discriminatees, Jamie Lange and Donald Meier. However, I concluded that Armstrong did not violate the Act by discharging a third alleged discriminatee, Calvin Lange, because he was a supervisor within the meaning of Section 2(11) of the Act. Additionally, I concluded that Armstrong lawfully discharged the fourth alleged discriminatee, Brad Meier, for improper conduct.

Armstrong took exceptions to my conclusions that it violated the Act by discharging Jamie Lange and Donald Meier. The General Counsel took exceptions to some, but not all, of my recommendations to dismiss certain Complaint allegations.

On December 16, 2004, the Board issued a Decision which adopted some of my recommendations concerning the 8(a)(1) allegations but disagreed with others. The Board rejected my conclusions that Armstrong had violated Section 8(a)(3) and (1) by discharging Jamie Lange and Donald Meier. Although it agreed that the General Counsel had carried the government's initial burden under *Wright Line*, 251 NLRB 1083 (1980), the Board found that Armstrong had established that it would have terminated the employment of Lange and Meier in any event, even in the absence of protected activity. See *Armstrong Machine Co.*, 343 NLRB No. 122 (December 16, 2004).

On January 18, 2005, Armstrong filed an Application for Attorney Fees under the Equal Access to Justice Act, 5 U.S.C. Section 504 ("EAJA"), and Section 102.143 of the Board's Rules and Regulations.

By Order dated January 28, 2005, the Board referred the Application to me for further appropriate action.

On February 8, 2005, the General Counsel filed a document consisting of a Motion to Dismiss the EAJA application and a memorandum in support of that motion.

On February 28, 2005, the Applicant filed a "Resistance to Motion to Dismiss of NLRB" (the "Resistance") and a "Response to General Counsel's Memorandum in Support of Motion to Dismiss" (the "Response").

By Order dated May 12, 2005 (attached hereto as "Appendix A"), I granted parts of the General Counsel's Motion to Dismiss. Specifically, the Order dismissed the Applicant's claims for fees and expenses incurred in connection with (1) Case 18-RC-16904, involving a representation petition filed by the Union; (2) all litigation in Iowa state courts, and (3) all proceedings concerning claims for unemployment compensation. In other respects, the Order denied the General Counsel's Motion.

Additionally, the Order directed the Applicant to file, "within 14 days of the date of this Order," a Clarification of its Application which excluded the dismissed claims, which provided specified information about all legal services for which the Applicant sought reimbursement, and which calculated the reimbursement rate at $75 per hour.

On Friday, May 27, 2005, the Applicant filed its clarification (which it captioned a "Revised Billing and Expense Statement") by delivering it to Federal Express with instructions for next day delivery. The General Counsel disputes the timeliness of this filing, which will be discussed later in this decision.

On June 16, 2005, the General Counsel filed a pleading captioned "Motion to Dismiss Application for Fees and Expenses Under the Equal Access to Justice Act, Answer to Application and Supporting Memorandum." This pleading, which for brevity will be called the "June 16 Motion," raised several matters, which will be discussed below.

Validity of May 12, 2005 Order

The General Counsel argues that the administrative law judge lacked discretion to allow applicant to file a clarified application. In essence, the General Counsel's June 16 Motion raises two challenges to the validity of the May 12, 2005 Order: (1) The Board's Rules do not give an administrative law judge authority to issue this type of order and (2) the order is invalid because it contravenes the carefully crafted framework which the Board established in Sections 102.143 through 102.155 of its Rules.

With respect to the first argument, Section 102.152 does afford the judge some latitude in deciding what steps should be taken to develop a full record. It provides, in pertinent part, as follows:

> Ordinarily, the determination of an award will be made on the basis of the documents in the record. The administrative law judge, however, upon request of either the applicant or the General Counsel, *or on his or her own initiative*, may order further proceedings, including an. . .additional written submission. . .

Section 102.152 (italics added). Thus, the Rule clearly authorizes the judge to order a party to file an additional document in appropriate instances. Of course, whenever the Board commits a matter to the judge's discretion, it expects the judge to use that discretion soundly.

It certainly would not be a sound exercise of discretion for a judge to issue an order which, in effect, threw a monkey wrench into finely-tuned adjudicative machinery. In essence, the General Counsel argues that the May 12 Order caused that kind of harm:

> When the administrative law judge issued his Order directing the Applicant to file a clarification, this had the effect of voiding the first Application, which was subject to the General Counsel's Motion to Dismiss. This had the further effect of giving the Applicant the proverbial "second bite at the apple."

The quoted passage, from the General Counsel's June 16 Motion, misapprehends both the intent and effect of the May 12, 2005 Order. The Order neither voided the first Application nor afforded the Applicant an opportunity to file a new one. Rather, it directed the Applicant to conform its pleadings to the rulings which granted parts of the General Counsel's motion to dismiss.

For example, the Order dismissed those portions of the Application which sought reimbursement for legal fees incurred in connection with unrelated proceedings in state court. The Order then directed the Applicant to clarify its Application by deleting these claims for reimbursement.

Similarly, the Order dismissed the portions of the Application which sought reimbursement for legal services in a representation case. The Order then directed the Applicant to clarify its Application by deleting such claims.

In these instances, the Order did nothing more than require debridement of the dead claims. However, in another instance, the Order directed the Applicant to clarify a claim that was still alive.

It appeared that in seeking reimbursement for legal services, the Applicant had based its calculations on a rate greater than $75 per hour. The May 12 Order directed the Applicant to recalculate its claims based on the allowed $75 hourly rate, and to clarify its Application accordingly. Such a recalculation would not permit the introduction of new claims or the expansion of existing ones.

In sum, the Order directed the Applicant to perform certain essentially clerical functions to conform the written Application to the rulings of the judge. This ministerial task neither required nor entailed the exercise of discretion. It did not allow the Applicant to broaden the Application in any way.

Although the General Counsel argues that the Order gave the Applicant a "second bite at the apple," it did not. To the contrary, it required the Applicant to spit out some of the first bite.

However, two other questions should be considered: (1) Was the May 12 Order consistent with the framework established by the Board's Rules? (2) Even if consistent with that framework, did the Order cause the General Counsel any prejudice?

Section 102.150 provides that the filing of a motion to dismiss an EAJA application shall stay the time for filing an answer to "a date 35 days after any order denying the motion." Thus, issuance of the May 12, 2005 Order, partially granting and partially denying the General Counsel's Motion to Dismiss, started the clock running for filing an Answer. The General Counsel had 35 days from May 12, 2005 to do so.

By requiring the Applicant to clarify its Application within 14 days, the May 12 Order introduced another step not spelled out in the Rules. However, Section 102.152 contemplates that in certain instances, the development of a complete record may require an additional measure, such as a further written submission. Therefore, I conclude that the May 12 Order is not facially inconsistent with the Rules.

Moreover, I conclude that in the circumstances of this case, requiring the Applicant to submit a clarification fell within the range of sound discretion, because it reasonably would result in the Board receiving a better and less confusing record, and because it did not delay the proceedings. Additionally, for the reasons discussed below, I conclude that the May 12 Order did not prejudice the General Counsel.

If the Order had allowed the Applicant to amend its Application in any material way, it could well have caused prejudice to the General Counsel, who then would have only 21 days, rather than the full 35 days, to respond to the new matters. However, the May 12 Order did not permit the Applicant to add any new matters, but only required it to "tidy up" the matters already in its Application. Because the General Counsel already knew the contents of the Application, and indeed had been successful in moving to dismiss some of them, he suffered no surprise or prejudice.

Timeliness of Applicant's Clarification

The General Counsel also argues that the Applicant failed to file a timely response to the May 12 Order. As stated above, the Applicant delivered its clarification, captioned "Revised Billing and Expense Statement," to Federal Express on May 27, 2005, with instructions for overnight delivery.

Also on May 27, 2005, the Applicant sent this same document. together with a "Motion for Extension of Time," to the Atlanta office of the Division of Judges by facsimile. According to the time and date information placed on the document by the sending fax machine in Des Moines, Iowa, which is in the Central time zone, the transmission began at 3:19 p.m. and concluded about 3:32 p.m., which was 4:32 p.m. Atlanta time, after the close of business of the Atlanta office.

May 30 was a federal holiday and the Atlanta office of the Division of Judges was not opened. Thus, the Division of Judges effectively received the facsimile on May 31, 2005, the same day this document arrived by Federal Express.

However, the document was due on May 26, 2005. Accordingly, both the document itself and the Applicant's request for an extension of time were untimely.

Because this document did not constitute a new application, and because it did not modify the initial application in any way except to conform it to my rulings on the Motion to Dismiss, its untimeliness does not affect the validity of the initial Application. However, I will not consider it to be part of the record in this proceeding.

The Merits of the EAJA Application

The following standard, set forth in Section 102.144(a) of the Board's Rules, will be applied to the claims in the Application:

> An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over

> which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

Calvin Lange's Supervisory Status

The Applicant asserts that the General Counsel was not substantially justified in disputing its claim that Calvin Lange was a supervisor within the meaning of Section 2(11) of the Act and, accordingly, that his discharge did not violate Section 8(a)(1) and (3) of the Act.

My conclusion that Calvin Lange was a statutory supervisor depended upon whether or not he had discharged an employee, which Lange denied. Accordingly, I reached the conclusion that Lange was a supervisor only after discrediting Lange's testimony.

Where the General Counsel presents evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct, the General Counsel's position is deemed to be substantially justified within the meaning of EAJA. *David Allen Co.*, 335 NLRB 703 (2001), citing *SME Cement, Inc.*, 267 NLRB 763 fn1 (1983). Accordingly, I conclude that the General Counsel was substantially justified in disputing Lange's supervisory status.

Owner Porter's Comments to Employees

The Applicant contends that the General Counsel was not substantially justified in asserting that Owner Cliff Porter violated Section 8(a)(1) of the Act by making certain statements about employees standing around. The Application states that "General Counsel's position, in Paragraph 5(c) [of the Complaint], was that the statements created an impression of surveillance." The Application also notes that these statements were on audiotape, and that the General Counsel filed no exceptions to my finding that the statements did not violate Section 8(a)(1).

Porter made the statements in question during a meeting with three individuals, Calvin Lange, Jamie Lange, and Donald Meier, whom Porter considered to be supervisors. (However, Jamie Lange and Donald Meier were not statutory supervisors.) During this meeting, Porter made a number of other statements which did violate the Act.

With respect to the statements described in Complaint paragraph 5(c), my decision concluded that they were ambiguous:

> It is possible to project an unlawful meaning onto these words in the same way that a dark design may be seen in an inkblot. When these words are considered in context, however, it becomes clear that Porter was not talking about employees' union activities.

As the Applicant noted, the General Counsel did not take exceptions to my conclusion that the statements were not violative, so the Board has not reviewed them. However, the Board did review certain other statements Porter made in this same conversation and disagreed with my conclusion that they did not violate the Act.

Specifically, the Board found violative Porter's comments about employees having a "bad attitude." The Board stated:

> In dismissing these additional allegations, the judge improperly isolated the statements from the coercive context in which they were uttered. When these statements are analyzed in the context of the entire November 23 conversation, it is clear that Porter threatened employees with suspension and discharge because of their union activity.

Quite possibly, if the Board had reviewed my dismissal of the allegations in Complaint paragraph 5(c), it might similarly have concluded that I was wearing the same blinders when I considered them. But in any event, as my decision noted, the comments were both ambiguous and in the same conversation with other statements which clearly were violative.

Thus, the General Counsel acted reasonably in alleging these statements to be violative. Moreover, considering the proximity of these comments to the statements found violative - they were part of the same conversation - I cannot conclude that they constituted a "discrete substantive portion" of the unfair labor practice proceeding.

In sum, I conclude that the General Counsel was substantially justified in litigating these allegations. Therefore, that portion of the EAJA Application must be denied.

Porter's Comments About Supervisory Status

My decision found that Porter did not violate the Act when he expressed to Calvin Lange, Jamie Lange and Donald Meier his belief that they were not supervisors and, accordingly, could not vote in the election. The Applicant asserts that the General Counsel was not substantially justified in alleging that this expression of belief violated the Act.

The Board majority affirmed my dismissal of these allegations. It distinguished *Shelby Memorial Home*, 305 NLRB 910 (1991), in which the employer insisted that certain individuals were supervisors and threatened them with discharge if they engaged in protected activity. Porter's comments did not go that far. After expressing his belief that the men were supervisors and ineligible to vote, Porter added they would find out after a hearing in the pending representation case.

Board Member Walsh dissented vigorously, citing precedent that an employer acts at its peril if it chills the exercise of the Section 7 rights of anyone who may later be found to enjoy the protection of the Act. Thus, very learned minds can disagree on such a close issue.

In view of this disagreement, I cannot easily conclude that the General Counsel acted unreasonably in alleging Porter's comments to be violative. EAJA does not preclude the General Counsel from bringing forward close questions or new theories of the law. *Hovey Electric, Inc.*, 330 NLRB 511, 512 (2000).

Complaint Paragraphs 5(m) and 5(n)

Complaint paragraphs 5(m) and 5(n) alleged that Porter had threatened to make employees work at night and to reduce their hours if they selected Union representation. Clearly, such statements would violate the Act if established. However, my decision did not credit the witnesses who attributed such statements to Porter, but instead credited Porter's denial. Accordingly, I dismissed the allegations. The EAJA application notes that the General Counsel did not take exceptions.

When the General Counsel's evidence, if credited, presents a prima facie case, I cannot find an absence of substantial justification. *David Allen Co.*, above. Accordingly, I deny this portion of the EAJA Application.

Complaint Paragraph 5(o)

The Application also asserts that the General Counsel lacked substantial justification in alleging, and litigating, the allegation in Complaint paragraph 5(o) that Michelle Clark-Ames threatened employees with loss of benefits if they selected the Union.

My decision credited Clark-Ames' denial only after a careful examination of the evidence. In part, I did not believe the General Counsel's witnesses because their testimony was somewhat vague, raising doubts about its reliability. However, had I credited this testimony, I would have found a violation.

In these circumstances, where the dismissal of an allegation turns on discrediting the otherwise sufficient testimony of the government's witnesses, I must conclude that the General Counsel was substantially justified in alleging and litigating the matter. Accordingly, I deny this portion of the EAJA application.

Complaint Paragraph 5(s)

Complaint Paragraph 5(s) alleged that Owner Porter unlawfully interrogated employees. The evidence established that Porter walked around the facility with a camcorder and stopped at various employees' work stations. While recording, Porter would ask an employee to identify his supervisor.

The General Counsel contended that Porter's conduct violated Section 8(a)(1) because he didn't first give the employee the assurances required by *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. den.344 F.2d 617 (8th Cir. 1965). After a lengthy analysis, I concluded that the law did not require Porter to do so.

As stated above, EAJA does not preclude the General Counsel from litigating a novel theory or close question, which is precisely what the General Counsel did here. Indeed, these unusual facts could have originated in the imagination of a clever law professor seeking to test her students by posing a question with no easy answer.

The Board develops the labor law in the same manner as common law judges, through actual cases. The limits of a particular principle can be discerned only by extending it, in minute increments a case at a time, until it no longer achieves a logical or just result. The General Counsel plays a vital role in this process by selecting a case in which a principle appears to fit, and then proceeding to test it. The concept of "substantial justification" recognizes this function.

In sum, I conclude that the General Counsel was substantially justified in litigating the lawfulness of this alleged interrogation. Therefore, I deny this portion of the EAJA application.

Complaint Paragraph 6(b)

The Application asserts that the General Counsel was not substantially justified in alleging that the Applicant had discharged employee Jim Lange, and then litigating that issue. The Application cites the decision's conclusion that the "great weight" of the evidence establishes that Lange was not fired but quit.

At the outset, it should be noted that the Applicant's Answer admitted the allegation that it had discharged Lange, an allegation which appears in Complaint paragraph 6(b). In view of this admission that the Applicant *discharged* Lange, the General Counsel cannot be faulted for attempting to prove that the discharge violated the Act.

At the hearing, the Applicant took the position that it hadn't discharged Lange at all. The Applicant's attorney established this fact by cross-examining Lange and eliciting admissions that Porter had not told Lange he was fired and that Porter told Lange that he could come back when he wanted to work.

However, the decision also noted that Lange hadn't always answered questions responsively and gave this example:

> QDid you ever tell Mr. Porter again that you wanted to work there?
> AWhen he told me to get my stuff and leave I was fired.

The Applicant's effective cross-examination diminished Lange's credibility and showed his "I was fired" testimony to be unreliable. Until such cross-examination, the General Counsel reasonably could premise a Complaint allegation on Lange's "I was fired" assertion. Significantly, after the Applicant's cross-examination of Lange, the General Counsel did not take exception to my conclusion that Lange had quit.

In sum, the dismissal of this allegation turned on a credibility resolution which would have been more difficult but for the Applicant's successful cross-examination. Accordingly, I conclude that the General Counsel was substantially justified, and deny this portion of the Application.

Discharge of Brad Meier

The Applicant's Answer admitted that it had discharged employee Brad Meier, but disputed that this action violated the Act. My decision concluded that the General Counsel had established

the initial four elements under ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which placed upon the Applicant the burden of establishing that it would have discharged Meier in any case, even in the absence of protected activity. My decision further concluded that the Applicant carried that burden. Therefore, I dismissed the allegation that the Applicant had discharged Meier unlawfully.

Even at the hearing, however, the Applicant presented very little evidence of the sort the Board requires to establish that an employer would have taken the same action against an employee even absent protected activity. See, e.g., *Lampi, LLC*, 327 NLRB 222 (1998)(the Board seeks documentation concerning how an employer acted in other similar instances). As the decision states, I would have found the Applicant's evidence insufficient to carry its burden of proof except for two factors: (1) The Applicant was a small employer which did not keep the kind of records typical in a larger operation, and (2) the record established that Meier had given the Applicant's management reason to be concerned about violence.

My conclusion that the Applicant carried its burden depended on which witnesses I credited. That, in turn, depended upon the demeanor of the witnesses at hearing. Thus, the decision states that "my observations of the witnesses lead me to credit Lyon" rather than Meier. "Therefore, I find that Meier swore at Lyon. Additionally, consistent with the testimony of both witnesses, I find that Meier directed a vulgar gesture towards Lyon."

The finding that Meier swore at the other employee, John Lyon, and directed a vulgar gesture towards him, constituted part of the foundation for the conclusion that the Applicant had reason to believe Meier had a potential for violence. Considering the significant role played by credibility determinations, I conclude that the General Counsel was substantially justified in proceeding on this allegation. Therefore, I deny this portion of the Application.

Maxine Lange's Status

The Application also seeks reimbursement for legal fees associated with the determination that Maxine Lange was not a supervisor but a bargaining unit employee. However, this matter pertains to the representation case, which is not part of the adversarial adjudication. Accordingly, it falls within the claims dismissed by the May 12, 2005 Order.

The Discharges of Jamie Lange and Donald Meier

The Complaint alleged, and my decision found, that the Applicant violated the Act by discharging Jamie Lange and Donald Meier. However, the Board reversed. The Applicant now seeks reimbursement for legal expenses occasioned by litigating these allegations.

The Board agreed with my conclusion that the General Counsel had proven the initial four *Wright Line* elements, which shifted to the Applicant the burden of proving that it would have discharged Jamie Lange and Donald Meier in any event, even in the absence of protected activity. The Board disagreed, however, with my conclusion that the Applicant had not carried this burden.

The Board concluded that the Applicant decided to discharge Lange and Meier in late November, after they had engaged in misconduct which included threatening another employee with physical violence and then disregarding management's instruction to stay away from the employee. However, the Applicant, on advice of counsel, did not discharge the two employees immediately, instead waiting until after a Board-conducted representation election.

In the time between the decision to discharge the two men and the actual termination of their employment, Owner Porter received additional information about the men's Union sympathies. However, the Board concluded, the "fact that the employees subsequently made a prounion statement does not change the fact that a lawful decision to terminate had been made, and does not require that this lawful decision be revoked."

The fact that the Board attached greater weight to the Applicant's evidence, concluding that it rebutted the General Counsel's case, does not signify that the General Counsel lacked substantial justification. To the contrary, the fact that the General Counsel established all four initial *Wright Line* elements indicates such substantial justification. Accordingly, I deny this portion of the Application.

Summary

For the reasons discussed above, and in all other respects, I conclude that the General Counsel was substantially justified in proceeding to hearing, and litigating, the allegations in question.

Order

IT IS ORDERED that the application for fees and expenses filed by Armstrong Machine Company is dismissed.

Dated at Washington, DC

Keltner W. Locke
Administrative Law Judge

APPENDIX A

May 12, 2005 Order

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

ARMSTRONG MACHINE COMPANY, INC.

and **CASES 18-CA-16276-1(E)**
18-CA-16555-1(E)

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 6

ORDER

This Order grants certain parts of the General Counsel's Motion to Dismiss an Application filed under the Equal Access to Justice Act, 5 U.S.C. Section 504 ("EAJA"), and Section 102.143 of the Board's Rules and Regulations. It also directs Armstrong Machine Company, Inc. ("Armstrong" or the "Applicant") to file a statement clarifying the portion of its EAJA claim which survives the Motion to Dismiss.

Procedural History

On January 3, 2002, United Food & Commercial Workers, Local 6 (the "Union") filed an unfair labor practice charge against the Applicant in Case 18–CA–16276–1. This charge alleged, among other things, that Armstrong had violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act") by discharging three individuals it employed: Calvin Lange, Jamie Lange and Donald Meier, Jr. After an investigation, the Regional Director for Region 18 issued a Complaint and Notice of Hearing in this matter on July 9, 2002.

On August 19, 2002, the Union filed an unfair labor practice charge against Respondent in Case 18–CA–16555–1. This charge alleged that on about April 3, 2002, Respondent discharged employee Brad Meier in violation of Section 8(a)(3) and (1) of the Act.

On September 3, 2002, the Regional Director issued an Order Consolidating Cases and Amendment to Consolidated Complaint, which consolidated Case 18–CA–16376–1 with Case 18–CA–16555–1 and added to the Complaint the allegation that Armstrong unlawfully discharged Brad Meier. A hearing opened before me on September 17, 2002, in Fort Dodge, Iowa.

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Before discussing the hearing and its outcome, one other matter warrants mention. In addition to the two unfair labor practice cases, the hearing also concerned a representation case, 18–RC–16904, which the Regional Director had consolidated with the unfair labor practice cases.

That representation case is not part of this proceeding. Under Subpart T of the Board's Rules and Regulations, only a party prevailing in an "adversary adjudication" is entitled to an award of fees and expenses. A representation case is not included within the definition of "adversary adjudication." See Section 102.143 of the Board's Rules.

Nonetheless, certain issues raised by the Motion to Dismiss pertain to the representation case. Specifically, the General Counsel asserts that the Application improperly seeks reimbursement, in part, for some services performed by the Applicant's attorney in the representation case. Therefore, background information concerning the representation case will be helpful.

On November 14, 2001, the Union filed the representation petition in Case 18–RC–16904. The Union and Armstrong entered into a stipulated election agreement which the Regional Director approved on December 3, 2001. This agreement provided for an election in the following collective–bargaining unit:

> All full–time and regular part–time production and maintenance employees employed by the Employer at its plant located at 10 SW 7th Street, Pocahontas, Iowa; excluding office clerical and office cleaning employees and guards and supervisors as defined in the National Labor Relations Act.

The Board conducted an election on December 13, 2001. The tally of ballots recorded 9 votes for the Union, 10 against, and 4 challenged ballots. Thus, the challenged ballots were sufficient in number to affect the outcome of the election. Additionally, Armstrong filed timely objections to conduct assertedly affecting the results of the election.

On July 11, 2002, the Regional Director issued a Report on Challenged Ballots and Objections, Order Directing Hearing, Consolidating Cases and Notice of Hearing. This order consolidated Case 18–CA–16276–1 with Case 18–RC–16904. As already noted, the Regional Director's further Order, dated September 3, 2002, added Case 18–CA–16555–1 and scheduled the hearing to begin September 17, 2002.

The hearing closed on September 26, 2002. Counsel filed post–hearing briefs. On March 7, 2003, I issued a decision which recommended dismissal of some but not all allegations. In the Complaint, the General Counsel had alleged that a number of statements by Armstrong's president, Clifford Porter, violated Section 8(a)(1) of the Act. My decision concluded that some of Porter's statements did interfere unlawfully with employees' Section 7 rights but that in other instances, the General Counsel had not proven a violation. In some of these instances, I found that Porter had

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made the alleged statement but that it did not violate the Act. In some other instances, based on credibility determinations, I found that Porter did not say the things which the discredited witness had attributed to him.

My decision also recommended that the Board find that Armstrong had violated Section 8(a)(3) and (1) of the Act by discharging two of the four alleged discriminatees, Jamie Lange and Donald Meier. However, I concluded that Armstrong did not violate the Act by discharging a third alleged discriminatee, Calvin Lange, because he was a supervisor within the meaning of Section 2(11) of the Act. Additionally, I concluded that Armstrong lawfully discharged the fourth alleged discriminatee, Brad Meier, for improper conduct.

Armstrong took exceptions to my conclusions that it violated the Act by discharging Jamie Lange and Donald Meier. The General Counsel took exceptions to some, but not all, of my recommendations to dismiss certain Complaint allegations.

On December 16, 2004, the Board issued a Decision which adopted some of my recommendations concerning the 8(a)(1) allegations but disagreed with others. The Board rejected my conclusions that Armstrong had violated Section 8(a)(3) and (1) by discharging Jamie Lange and Donald Meier. Although it agreed that the General Counsel had carried the government's initial burden under *Wright Line*, 251 NLRB 1083 (1980), the Board found that Armstrong had established that it would have terminated the employment of Lange and Meier in any event, even in the absence of protected activity. See *Armstrong Machine Co.*, 343 NLRB No. 122 (December 16, 2004).

On January 18, 2005, Armstrong filed an Application for Attorney Fees under the Equal Access to Justice Act, 5 U.S.C. Section 504 ("EAJA"), and Section 102.143 of the Board's Rules and Regulations.

By Order dated January 28, 2005, the Board referred the Application to me for further appropriate action.

On February 8, 2005, the General Counsel filed a document consisting of a Motion to Dismiss the EAJA application and a memorandum in support of that motion.

On February 28, 2005, the Applicant filed a "Resistance to Motion to Dismiss of NLRB" (the "Resistance") and a "Response to General Counsel's Memorandum in Support of Motion to Dismiss" (the "Response").

The General Counsel's Motion to Dismiss

The General Counsel asserts that Armstrong's EAJA Application should be dismissed for a number of reasons. These arguments may be placed in three general categories: (1) The Application fails to comply with Section 102.147(h) of the Board's Rules and Regulations; (2) The Applicant failed to cooperate fully during the underlying investigation of the charges, and (3) the

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General Counsel was substantially justified. These will be considered in the order they appear in the General Counsel's Memorandum in Support of Motion to Dismiss (the "Memorandum").

(1) Asserted Noncompliance with Section 102.147(h)

a. Claim for Precomplaint Services

Noting that only fees and expenses incurred in an "adversary adjudication" may be recovered under EAJA, the General Counsel contends that the Application seeks, in part, an award of attorney fees for services rendered before the initial complaint issued on July 9, 2002. The General Counsel's Memorandum further states:

> It is General Counsel's position that until July 9, 2002, Applicant had no need to prepare for adversary adjudication. Yet Applicant's claim makes no effort to differentiate between expenses and fees incurred before complaint issued and expenses and fees after complaint issued. More specifically, the first 9½ pages of listed expenses and the first 12½ pages of listed fees are expenses and fees incurred prior to issuance of the complaint on July 9, 2002.

From its Response, it is not clear whether the Applicant disavows an intention to claim fees for legal services related to the precomplaint investigations. The Response takes the position that the Board's Rules *required* it to submit complete attorney billing records and these documents necessarily listed fees for services outside the scope of the EAJA claim. Thus, the Response quotes Rule 102.147(h) and then states, "Given the requirements of the rule, the entirety of counsel's bill to Armstrong Machine Company, Inc. was not only submitted, *but required*, in the same form and fashion as submitted to the client itself." (Emphasis added.) In other words, the Applicant appears to be saying that just because the lawyer's invoice lists a particular service, and the amount charged for the service, it doesn't mean that the Applicant is actually claiming reimbursement for that amount.

The Applicant's understanding of Rule 102.147(h) differs somewhat from mine. But even if I am correct in assuming that the rule only required the Applicant to present documentation concerning fees it *did* claim for reimbursement, the inclusion of extraneous and irrelevant information only makes the claim confusing, not invalid. Solving the problem of confusion requires the Application to be clarified rather than dismissed. Accordingly, this portion of the Motion to Dismiss will be denied.

b. Representation in Unrelated Matters

The General Counsel asserts that the Applicant is seeking an award which would reimburse it for legal services other than representation in the adversarial adjudication involving Cases 18–CA–16276–1 and 18-CA-16555-1. These allegedly unrelated matters may be placed in three categories: (1) The precomplaint investigation of the unfair labor practice charges in Cases 18–CA–16276–1 and 18-CA-16555-1, (2) the election in Case 18–RC–16904, and (3) matters not

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involving the Board at all, notably, state unemployment compensation matters involving the alleged discriminatees and a lawsuit against the Applicant in state court.

1. Precomplaint Investigation of Cases 18–CA–16276–1 and 18-CA-16555-1

The General Counsel contends that no attorney fees may be claimed under EAJA for services rendered before the date of the unfair labor practice complaint. The Applicant's Response does not draw such a clearcut line.

The Applicant argues that the General Counsel is taking two contradictory positions in the Motion to Dismiss: On the one hand, the General Counsel's Memorandum asserts that until July 9, 2002, the date of the initial complaint, the Applicant "had no need to prepare for adversary adjudication." On the other hand, the Memorandum also contends that the EAJA Application should be dismissed because the Applicant failed to make its president available for interview by the Board agent during the investigation.

The Applicant's Response does not set out the step–by–step reasoning leading from this claimed contradiction to the conclusion that EAJA allows reimbursement of precomplaint legal fees. However, as I reconstruct it, the Applicant's argument consists of three steps which can be paraphrased as follows:

First, if an EAJA award can be denied because the Applicant did not cooperate fully with the investigating Board agent, then as a practical matter, the Applicant was under a legal duty to cooperate. The legal duty exists because a failure to discharge this duty would result in the forfeiture of the right to receive a recovery under EAJA.

Second, if the Applicant had a legal duty to cooperate with the Board agent, it was reasonable for the Applicant to retain counsel for that purpose.

Third, the duty to cooperate fully during the investigation turned the investigation into an adversary adjudication. Accordingly, the services performed by the Applicant's attorney should be compensable under EAJA.

The Response doesn't articulate why a duty to cooperate (assuming it exists) would change an investigation into an adjudication. Instead, the Applicant's argument that precomplaint attorney fees should be reimbursed focuses on this statement in the General Counsel's Memorandum: "It is General Counsel's position that until [complaint issued on] July 9, 2002, Applicant had no need to prepare for adversary adjudication." In reply, the Response states:

> The position that Armstrong Machine Company, Inc. was required to cooperate, provide documents, provide witnesses and otherwise "fully cooperate" belies the [General Counsel's] argument that no preparation was needed until a complaint issued on July 9, 2002, setting a hearing for less than three months later. . .

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This argument must be rejected. Whether or not the Applicant *needed* to prepare for the adversary adjudication is not the standard to be applied. Rather, the proper test asks this question: Was the particular attorney fee or expense incurred *in connection with* an adversary adjudication or with a significant and discrete substantive portion of it? See 29 CFR Section 102.144.

Read literally, the Board's Rules do not compel a conclusion that EAJA applies only to legal services rendered on or after the date the complaint issued. The Rules do limit the term "adversary adjudication" to "unfair labor practice proceedings pending before the Board on complaint and backpay proceedings. . ." See 29 CFR Section 102.143(a).

Clearly, this definition excludes from an EAJA award attorney fees for services in connection with the investigation of an unfair labor practice charge. However, this question remains: Can the nature of the lawyer's services be determined accurately simply based on whether they occurred before or after the complaint date?

In general, an unfair labor practice investigation ends in withdrawal of the charge, dismissal of the charge, or issuance of a complaint. So the date a complaint issues does provide a kind of dividing line separating investigation from prosecution. However, a Board investigator typically gives the charged party some advance notice of the Regional Director's intention to issue complaint to allow an opportunity for settlement. Indeed, the Board agent often will tender a settlement proposal and provide the charged party with a specific deadline for settlement, absent which complaint will issue. Thus, the charged party's lawyer becomes aware of the imminent litigation before the complaint issues. An attorney arguably might perform services *in connection with* the adversary adjudication even before receipt of the complaint.

Whether a particular portion of a lawyer's bill concerns services rendered in connection with an adversary adjudication must be determined by considering the pertinent facts and circumstances. Although the date of the initial complaint affords a rule of thumb, it does not have the same accuracy as examining what the lawyer actually did and then determining whether this work had a sufficient connection to the adversary adjudication. A Motion to Dismiss does not offer the appropriate occasion for resolution of such contested and fact–intensive issues.

Another circumstance also makes it inappropriate to grant the Motion to Dismiss on this particular issue. The present case involves the consolidation of two unfair labor practice charges into a single adversary adjudication, and that complicates the facts.

The initial complaint, in 18–CA–16276–1, issued on January 3, 2002, and the adversary adjudication in that case then began. However, on August 19, 2002, the Union filed another charge, in Case 18–CA–16555–1. The investigation of this charge lasted until the Regional Director's September 3, 2002 Order Consolidating Cases and Amendment to Consolidated Complaint.

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During the period of August 19, 2002 through September 3, 2002, the Applicant's counsel may have performed some services pertaining to the adversary adjudication in 18–CA–16276–1 and other services pertaining to the investigation in 18–CA–16555–1. Only the former would be cognizable under EAJA.

Determining which services have a sufficient connection to the adversary adjudication necessarily will entail resolving contested issues of fact and law. Therefore, granting this portion of the Motion to Dismiss would be inappropriate.

2. Legal services in connection with Case 18–RC–16904

Clearly, the representation case is not an "adversary adjudication" as defined in Section 102.143 of the Board's Rules. I grant the Motion to Dismiss with respect to attorney fees and expenses incurred in connection with Case 18–RC–16904.

3. Legal services not related to Board proceedings

The Consolidated Complaint in Case 18–CA–16276–1 and 18–CA–16555–1 alleged, among other things, that the Applicant had discharged Calvin Lange, Jamie Lange and Donald Meier in violation of the Act. On March 26, 2002, these three individuals filed a wrongful discharge lawsuit in Iowa state court against "Clifford Porter and Michelle Clark d/b/a Armstrong Machine Company." The lawsuit alleged that the plaintiffs had been engaged in union organizing activities, that the defendants had discharged them for this reason, and that these discharges were wrongful because contrary to the public policy embodied in the National Labor Relations Act.

The Applicant seeks reimbursement for attorney fees incurred in defending this lawsuit, which presumably was dismissed because preempted by federal law. However, the Applicant has not asserted that the three plaintiffs were employed by, or agents of, the General Counsel. Similarly, the Applicant has not suggested that the General Counsel encouraged these plaintiffs to file a lawsuit in state court. Indeed, the Applicant doesn't even claim that the General Counsel knew that these individuals contemplated filing such a lawsuit. Instead, the Response states:

> It is the position of Armstrong that had the NLRB properly informed these complaining witnesses concerning the exclusivity of the proceedings, and the investigatory process used by the NLRB, this corollary litigation may well not have occurred. However, due to the likelihood that the corollary litigation would proceed with discovery, statements under oath, and otherwise gather evidence to be used in the NLRB proceeding, Armstrong was obligated to defend itself, seek dismissal, and avoid substantial corollary litigation.

Regardless of whether the General Counsel "properly informed" the plaintiffs about federal preemption, EAJA does not impose upon the General Counsel a duty to do so. More generally, EAJA does not create a means to hold the General Counsel liable, as in a common law tort case, for any action or inaction incidental to investigating or prosecuting an unfair labor practice case.

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It appears the Applicant contends that its lawyer's services defending against the state court lawsuit were services "in connection with" the unfair labor practice proceeding because the lawsuit was based on the same facts and because discovery in the state court action might somehow benefit the General Counsel in prosecuting Cases 18–CA–16276–1 and 18–CA–16555–1. However, if any connection at all exists between the state court lawsuit and the unfair labor practice proceeding, it is so highly attenuated as to be undetectable. The two proceedings involve different parties appearing independently before different tribunals.

Although the Applicant asserts that information discovered in the state court lawsuit might somehow benefit the General Counsel in the unfair labor practice proceeding, the Applicant certainly does not contend that the General Counsel sponsored the plaintiffs' lawsuit or gave covert encouragement to the plaintiffs to reap the benefit of their discovery efforts. There is no need to speculate here about such a strange hypothetical situation.

Indeed, the Applicant has not pointed to any concrete connection between the state court lawsuit brought by its former employees and the unfair labor practice prosecution brought by the federal government. In the absence of any such connection, the Applicant cannot argue persuasively that its attorney's services in the state lawsuit somehow were *in connection with* the cases before me now.

Accordingly, I will grant the Motion to Dismiss to the extent that the Applicant seeks reimbursement for the attorney fees and expenses it incurred in the state lawsuit.

It appears that the Applicant also seeks reimbursement for the legal expenses it incurred in defending against unemployment compensation claims in proceedings before an Iowa state agency. Thus, its Response states:

> Additional litigation was also conducted before the Iowa Workforce Development by many of the complaining witnesses who were discharged by Armstrong. In the course of that litigation, discovery requests were made which included information directly relevant to, and used in, the proceedings before the NLRB. One such discovery requested [sic], attached hereto as Exhibit F, relates specifically to "union activities," and "all statements prepared by an employee of Armstrong Machine Company, Inc. concerning claimant, or for purposes of responding to an NLRB election, an NLRB certification process or NLRB[–]related complaints.["] Consequently, it is clear that discovery was being done by union members or proponents, and, upon information and belief, provided to the NLRB or General Counsel. A copy of General Counsel's subpoena requesting nearly identical information, as well as information provided in connection with the election proceedings, some of which was previously provided, is attached hereto as Exhibit G.

The Applicant attached to its Response, as Exhibit F, a document production request filed by Jamie Lange in the state unemployment compensation proceeding. However, the fact that this request sought some of the same documents as the General Counsel's subpoena does not establish that the state unemployment compensation proceeding and the federal unfair labor practice

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adjudication were somehow connected. No evidence indicates such a connection and the Applicant stops short of claiming one.

In sum, the Applicant has not demonstrated that the legal fees and expenses it incurred in the unemployment compensation proceedings were in connection with the adversary adjudication in Cases 16–CA–16276–1 and 18–CA–16555–1. Accordingly, I will grant the Motion to Dismiss with respect to fees and expenses incurred by the Applicant in connection with the unemployment compensation proceedings.

C. Claimed fees exceed $75 per hour

In the Memorandum supporting the Motion to Dismiss, the General Counsel states that the "Applicant has submitted bills calculated at $125 to $200 per hour, and requested (without further explanation) 'fees and expenses. . .at the maximum rate allowed by law. (Application, page 7)"

Section 102.145(b) of the Board's Rules limits reimbursement for fees to $75 per hour and the record does not establish that the Applicant has submitted any petition for a rate exceeding that limit.

Although the Applicant may not receive an award for fees at a rate exceeding $75 per hour, I do not conclude that the Application should be dismissed because it appears to seek fees in excess of that rate. Rather, I shall direct the Applicant to file a statement setting forth the fees and expenses it continues to claim, after excluding those claims which are inconsistent with this Order. The Applicant's clarification shall itemize the amount of time spent by its lawyers and shall calculate their fees at the rate of $75 per hour.

To the extent that the General Counsel urges dismissal of the Application because it seeks reimbursement at a rate exceeding $75 per hour, the Motion to Dismiss is denied.

D. General Counsel's "Defective Application" Argument

For the reasons discussed above, I have concluded that portions of the Application should be dismissed because they seek an award of fees for legal services which were not incurred in connection with the adversary adjudication in Cases 16–CA–16276–1 and 18–CA–16555–1. The General Counsel's Memorandum argues that these portions of the Application render it defective. It states:

> Because of the numerous defects and inaccuracies, General Counsel moves for dismissal of the Application. See *Blankenship & Associates*, 297 NLRB 799, 800 (1990)(discussion by ALJ Marvin Roth).

Although the General Counsel cites Judge Roth's discussion in the *Blankenship & Associates* case, the Board did not rely on this discussion. The Board expressly noted that "we agree with the judge's finding that the General Counsel was substantially justified in pursuing the

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litigation and therefore *find it unnecessary to pass on his additional reasons* for denying the application." *Blankenship & Associates*, above, 297 NLRB at 799, fn. 1. (Emphasis added.)

I believe the Board would share my concern that dismissing the entire Application would work injustice by denying the Applicant the opportunity to have its case considered on the merits. Such consideration on the merits is quite distinct from the type of analysis necessary for ruling on a motion to dismiss. See generally, *Meaden Screw Products Co.*, 336 NLRB 298 (2001).

In *Meaden Screw Products*, the Board held that the General Counsel could raise the same "substantial justification" argument in both a motion to dismiss and again later, in an answer to the EAJA application. Doing so did not constitute an improper attempt to relitigate an issue which already had been considered and rejected.

That principle flows logically, I believe, from the primary function of the motion to dismiss procedure. It serves some of the same gatekeeping purpose as a maitre d' at an elegant restaurant, who makes sure the customers are wearing shirts and shoes before seating them for service. Similarly, by motion to dismiss, the General Counsel may challenge the claims of applicants who fail to meet the basic EAJA eligibility requirements and claims which lie outside the scope of the statute.

Obviously, an enterprise too large to qualify under EAJA may be excluded early in the process because consideration of the merits of its EAJA claim would accomplish nothing; it could not receive an award in any event. Similarly, a particular EAJA *claim* may be excluded if, on its face, the claim falls outside the scope of the statute. Considering the merits of a claim filed by an applicant who lawfully could not recover, or considering the merits of a claim which lawfully could not be granted, would waste the Board's time and the taxpayers' money.

Likewise, granting a motion to dismiss also conserves government resources when the material facts are not in dispute and those facts, viewed in the light most favorable to the applicant, unambiguously establish that the claim lacks merit. Here, too, spending time considering a claim which couldn't possibly succeed would squander the government's resources. In all of these situations, granting a motion to dismiss serves efficiency and does not disserve justice.

However, the General Counsel's "defective application" argument does not fit comfortably into any of these categories. Rather, it requires me to assume that every single portion of the Application lacks merit simply because many parts do. Such an approach certainly would avoid the trouble and effort of considering the case on the merits, but at substantial risk of injustice. A judge must separate the wheat from the chaff rather than throw out the wheat *with* the chaff. Therefore, I reject the argument that the entire Application is unworthy of consideration on the merits simply because certain parts of it should be dismissed.

The General Counsel's "defective application" argument does have one other aspect. At this point, the extraneous matter in the Application has made it quite confusing. However, this

problem may be corrected by dismissing those claims which are facially inappropriate and requiring the Applicant to clarify the remainder.

Therefore, I will deny the General Counsel's Motion to Dismiss the entire application.

(2) Applicant's Asserted Failure to Cooperate

The General Counsel's Memorandum contends that its position in the adversary adjudication was "substantially justified based upon Applicant's failure to make witnesses available during the investigative stage of these matters." However, neither this statement nor other parts of the Memorandum set out the specific logical steps and assumptions implicit in the General Counsel's argument. Elaborating the full argument, rather than a shorthand version of it, is important, because the reasoning is rather subtle.

The full argument runs as follows: Had the Applicant complied with the Board investigator's request to interview certain management witnesses, the investigator would have obtained information which could have affected the Regional Director's decision to include certain allegations in the Complaint. Not having this information, the Regional Director acted reasonably in alleging and trying to prove these matters. (The argument also posits that it is reasonable for the Regional Director to rely less on a conclusory position letter from a party's counsel than on an affidavit prepared by a Board investigator while interviewing a witness, and signed by the witness under penalty of perjury.)

The "failure to cooperate" argument does not embrace any notion that a charged party should be penalized for choosing not to present management witnesses during an investigation. Except for the unusual circumstance of an investigative subpoena, presumably not present here, a charged party has the legal right not to present witnesses for interview.

Rather, the "failure to cooperate" argument addresses the issue of substantial justification by focusing on what information informed the Regional Director's decision to prosecute. Thus, the Memorandum states that the "General Counsel contends that its position *was substantially justified* based upon the Applicant's failure to make witnesses available during the investigative stage. . ." (Emphasis added)

The General Counsel bears the burden of proving that the government's position was substantially justified. Therefore, to prevail on the "failure to cooperate" argument, the General Counsel must demonstrate – and not merely assume – that the Applicant's failure to provide a management witness deprived the Regional Director of information which would have affected the decision to prosecute. In other words, the argument turns on issues of fact as well as law.

The Applicant clearly disputes the General Counsel's position. The General Counsel's argument therefore raises contested issues which make the matter inappropriate for resolution at this time.

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As the Board held in *Meaden Screw Products Co.*, above, the General Counsel may raise arguments regarding substantial justification both at the motion to dismiss stage and later. Although I now reject the General Counsel's "failure to cooperate" argument, I do so only for purposes of the Motion to Dismiss and express no opinion as to how I might decide this issue if considering it de novo at a later date.

(3) The General Counsel Was Substantially Justified

The Motion to Dismiss also asserts that the General Counsel was substantially justified in litigating the issues raised by the Complaint. Viewing the record in the light most favorable to the Applicant, I cannot conclude that the General Counsel has carried his burden of proof. Accordingly, I will deny the Motion to Dismiss to the extent that it rests on the "substantially justified" argument.

CONCLUSION

The Motion to Dismiss is **GRANTED** with respect to the Applicant's claims for fees and expenses incurred in connection with (1) Case 18–RC–16904, (2) all litigation in Iowa state courts, and (3) all proceedings concerning claims for unemployment compensation. In all other respects, the Motion to Dismiss is **DENIED**.

IT IS FURTHER ORDERED that within 14 days of the date of this Order, the Applicant shall file with undersigned and serve upon the opposing parties a Clarification which shall exclude from its Application all claims pertaining to Case 18–RC–16904, to litigation in state court, and to proceedings concerning claims for unemployment compensation.

IT IS FURTHER ORDERED that this Clarification shall identify all legal services and expenses for which reimbursement is sought, and which were incurred in connection with the adversary adjudication (but not the precomplaint investigation) of Cases 18-CA-16276 and 18-CA-16555. With respect to all claims for legal fees, the Clarification shall include specific information concerning each instance in which the attorney provided services for which reimbursement is sought, the name of the attorney providing such services, the nature of the services, the amount of time spent by the attorney, and the fee for those services calculated at the rate of $75 per hour.

In accordance with Section 102.150(a) of the Board's Rules and Regulations, the General Counsel's Answer to the Application shall be filed within 35 days of the date of this Order.

Dated at Atlanta, Georgia, this 12th day of May 2005.

_____

Keltner W. Locke
Administrative Law Judge